



REPUBLIC OF KENYA

COURT OF APPEAL OF KENYA

AT NAIROBI

CIVIL APPEAL 119 OF 2005

NYORO KIMWE.....APPELLANT

AND

JOHN ANDERSON GITHINJI.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (P.J. Ransley, J) dated 14th March, 2005

in

H.C.C.C. NO. 397 OF 2001(O.S)

JUDGMENT OF THE COURT

The appellant in this appeal *Nyoro Kimwe* and the respondent *John Anderson Githinji* are brothers. Their father died in 1952 according to the respondent. They were left with their mother and sister. Those also died later after the year 1959 but both of them could not tell the year and date when they died. The appellant said in evidence on record that in the year 1957/58, he bought land parcel Number Kiambaa/Ruaka/T67 from one Kamuiru Mareka who was the original registered proprietor but who subsequently transferred it to one Peter Kiriani Mumita on 22nd January, 1980. He filed a suit against both of them, to wit, HCCC No. 655 of 1981(OS) *Nyoro Kimwe vs. Kamuiru Kinyanjui and Another*, and won the suit so that on 10th September 1984, he was registered the owner of the suit land. He said in evidence that he paid Ksh.600/= for the land of which Ksh.100/= was paid cash whereas the amount of Ksh.500/= was paid through his services to the vendor. The respondent's evidence was however that the land was bought for Ksh.500/= which money was given to the appellant by their mother and the land was originally bought to be owned jointly by the two brothers. Whoever paid for the land, and whatever amount was paid for the land, the undisputed facts were that as on 10th September 1984, the appellant was the registered owner of the land and the respondent was the one physically living on the land. The respondent admitted in evidence that the appellant's son had a house on the subject land in which the sons of their sister were living. Earlier, before their mother died, he was also living on the same land. Before the land was registered in the appellant's name and precisely on 4th May 1981, the Chief of the area, acting at the request of the appellant, asked the respondent to vacate the land but the respondent refused to do so. Peter Kiriani Mumita to whom the original owner had transferred the land had also asked him (the respondent) to vacate the land but he refused. That was in 1981 before the appellant was registered as the owner. Later in July 2001 the respondent was "sued" before the clan elders who gave him six months to vacate the land upon the appellant paying to him Ksh.20,000/= for a borehole that the respondent had sunk on the land. He still refused to leave the land. Several other threats

were brought to bear upon the respondent such as the appellant going to the site and dumping building materials on the land and appellant's sons threatening the respondent with physical violence so as to force him out of the land but the respondent stayed put.

On 13th March, 2001, four months before the elders' decision, the respondent moved to the superior court and filed an Originating Summons in which he sought the court's determination of the following questions:-

- “(a) Whether or not the defendant's title to the suit premises have been extinguished by the expiry of time.*
- (b) Whether or not the defendant's claim to the ownership is time barred by the limitations (sic) of Action Act Chapter 22 Laws of Kenya.*
- (c) Whether or not the plaintiff has acquired title to Kiambaa/Ruaka/T67 by prescription.*
- (d) Whether or not the defendant is registered as the owner of Kiambaa/Ruaka/T67 in trust for the plaintiff.*
- (e) Whether or not the plaintiff should be registered as the owner of Kiambaa/Ruaka/T67.*
- (f) Who should be condemned to bear the court (sic) of the suit.”*

Having posed those questions in the originating summons, he proceeded in the same originating summons to seek five orders, which were:-

- “1. A declaration that the defendant is registered as the owner of Kiambaa/Ruaka/T67 in trust for the plaintiff.*
- 2. A declaration that the defendant's title has been extinguished by effluence of time and his claim to Kiambaa/Ruaka/T67 is time barred and offends the provision of limitations (sic) of Actions Act Chapter 22 Laws of Kenya.*
- 3. A declaration that the plaintiff is entitled to land reference Kiambaa/Ruaka/T67 by prescription.*
- 4. An order that the plaintiff JOHN ANDERSON GITHINJI be registered as the owner of Kiambaa/Ruaka/T67.*
- 5. That the defendant do bear the cost of the originating summons.”*

The parties and the trial court are in agreement that the originating summons had no supporting affidavit as would be expected under **Order 36 rule 10**. But the originating summons was filed together with a chamber summons in which the respondent sought injunction orders. The Chamber Summons was dated 6th March 2001 and filed on 13th March 2001 together with the aforesaid originating summons. That chamber summons, which was later withdrawn at the time directions were taken, had a supporting affidavit. The respondent in his response to the originating summons and the chamber summons did not raise that issue but filed appropriate affidavits. On 25th June 2001, the originating summons was placed before Kuloba J. and on that day although the chamber summons dated 6th March 2001 was the matter to be heard, it would appear directions on the originating summons were taken. The entry in that court's record for that date shows the following:-

*“25.6.2001
Coram: Kuloba J.
Kabetu – Court Clerk
Mr. Ngaira, holding brief for Mr. Mburu
for applicant.
Mr. Kahiga for respondent.*

Order

By consent the application dated 6th March, 2001 is withdrawn. The Originating Summons be heard by viva voce evidence; affidavits on record be considered; date be taken at the registry.”

Upon those directions, the matter came up for hearing before Ransley J. who after hearing the respondent and the appellant none of who

called witnesses, and after considering the matter including written submissions, and the proceedings before the elders, dismissed the respondent's plea that the appellant held the subject land in trust for the respondent, but allowed the respondent's plea based on adverse possession. He stated in part as follows:-

The possession of the suit premises by the plaintiff became adverse in 1980 when the letter was received from Munoru & Njugi. This gave the plaintiff 28 days to vacate the premises on its expiry on the 18th July 1980 or thereabouts. This I find is the date when plaintiff occupation became adverse to the registered owner of the suit premises. This was firstly Peter Kiriani Mumita.

However subsequently after the suit premises was registered in the name of the defendant I find that he took the land subject to the plaintiff's adverse possession of the land. I do not believe that he agreed or permitted the plaintiff to remain on the land but rather kept quiet until in 2001 when he went to the chief who gave the plaintiff six months from March 2001 to September 2001 to vacate the land.

Originating Summons herein was filed on the 6/3/2001 and the plaintiff in order to succeed must show that his possession was adverse to the registered owner for a period of at least 12 years before then. This would mean the possession had to be adverse from 5th March 1984 at least.

In fact I find the possession was adverse from July, 1983.

In the result the plaintiff has proved a title by way of adverse possession and I grant prayer (sic), 2, 3 and 4 with costs to the plaintiff."

The appellant was aggrieved by that decision and hence this appeal premised on eleven (11) grounds, a summary of which is that the suit was **void ab initio** for lacking the requisites of a suit brought by way of an originating summons; that the Judge erroneously based his final decision on pleadings which were not before him; that no title was proved by the respondent by way of adverse possession as held by the learned Judge; that the learned Judge erred in referring to the appellant as a consummate liar; that the learned Judge erred in finding that the appellant was given money to buy the subject property as there was no evidence to support the allegation; that the Judge gave contradictory years as regards the date when the respondent's possession became adverse; that the learned Judge erred in finding that the year 1980 was the year when possession became adverse to the original owner; that he erred in finding that the appellant had never lived on the subject land in the face of no proof of the same; that the learned Judge failed to consider the investments made in respect of the subject property and the fact that the appellant's descendants had occupied the suit land for a long period and would be rendered landless by the learned Judge's decision and that the decision went against the weight of evidence that was before the court.

In his submissions before us, Mr. Siaji, the learned counsel for the appellant, on the main amplified the grounds set out in the memorandum of appeal which we have summarized above and urged us to allow the appeal. Mr. Kiiru, the learned counsel for the respondent concentrated his submissions on the reply to the points raised in the memorandum of appeal and asked us to dismiss the appeal with costs to his client.

We have anxiously considered the record of appeal, the history of the entire case, the grounds raised in the memorandum of appeal, the submissions by both learned counsel and the law. The learned Judge of the superior court was plainly right when he found and held that the first prayer for a declaration of trust could not be granted by way of originating summons. As there was no cross appeal on that, we will not pursue it any further. He was also right that what was before him and which is before us as a first and last appellate court is the issue of adverse possession since we also are of the view that whether the property was bought with money from their mother or from the appellant, two main facts remain and these are, first, that the land was registered in the name of the appellant on 5th March 1984 and by the time the originating summons was filed on 13th March 2001, a period of seventeen years had expired. Throughout that period the land was still in the name of the appellant. The second is that both the appellant and the respondent agree that the respondent had lived on the land in dispute throughout that period and the period prior to 6th March 1984. Indeed the respondent says in his evidence:-

“I have lived in the suit premises since 1958 until today.”

And the appellant, in cross examination stated:-

“From 1963 to 1965 I went to live in Rift Valley. The plaintiff has a house built but I did not give permission to build it.”

Those two issues having been thus settled, the next and important matter for us to resolve is whether the respondent by so living on the land registered in the name of the appellant and using it for all that time did acquire possession of the entire land under the legal principle of adverse possession pursuant to the provisions of **section 38 (1)** of the Limitation Actions Act Chapter 22 Laws of Kenya. In other words, was the appellant barred by Limitation of Actions Act Chapter 22 of the Laws of Kenya from claiming back the entire land? We will revert to this issue later on in this judgment. In the case of **Titus Mutuku Kasuve vs. Mwaani Investments Ltd and four others** – **Civil Appeal No. 35 of 2002**, this Court stated:-

“And in order to be entitled to the land by adverse possession the claimant must prove that he has been in exclusive possession of this land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by the discontinuation of possession by the owner on his own volition – Wanje vs. Saikwa (No.2) [1984] KLR 284. A title by adverse possession can be acquired under Limitation of Actions Act for a part of the land and the mere change of ownership of the land which is occupied by another under adverse possession does not interrupt such person’s adverse possession - See Githu vs. Ndete [198] KLR 776.”

That decision followed another decision made by this Court which was decided only one month before it. That was in the case of **Mbugua Njuguna vs. Elijah Mburu Wanyoike and another** – **Civil Appeal No. 27 of 2002**. This Court stated as follows:-

“By section 38(1) a person who claims to have been entitled by adverse possession to land may apply to the High Court for an order that he be registered as proprietor of the land in place of the registered proprietor..... A title by adverse possession can be acquired under the limitation of Actions Act to part of the parcel of land to which the owner holds title – see Githu vs. Ndeete [1984] KLR 776 at page 780 paragraph 25.”

Lastly, on the question of dispossession, Lord Lindhoy MR had this to say in the case of **Littledale vs. Liverpool College [1900] 1 Chp. 19, 21:-**

“The next question therefore, is what constitutes dispossession of the proprietor. Bramwell L.J. in Leigh vs. Jack said at 273, that to defeat a title by dispossessing the former owner “acts must be done which are inconsistent with his enjoyment of the suit for the purpose for which he intended to use it.”

In this case, whether we take the year 1980 when the respondent received a letter from Munoru & Njugi to vacate the land and refused to do so, or the year 1984 when the appellant was registered as the owner of the suit land or July 1983 which was held by the learned Judge to be the date when respondent’s possession became adverse to that of the appellant, the respondent was in possession, according to the appellant, without appellant’s permission or consent. The appellant said in evidence:-

“I have told him to move. When he was staying I allowed him to stay there but when he was an adult I wanted him to leave.”

In cross examination, the appellant stated that the respondent had a house built on the land but he did not give him permission to build there. Further, as we have stated earlier, the matter was reported to the Chief by the former owner of the land, and the Chief told the respondent to leave the land way back in 1981 but the respondent adamantly refused to vacate the suit land. He had his house on the land and used the land in his own way not acceptable to the appellant. With that evidence on record, we are of the view that to some extent, the learned Judge of the superior court was right in finding that the respondent was clearly in adverse possession of the land in dispute. However, we find it difficult to appreciate that he was in exclusive possession of the entire land in dispute for all the period relevant to this matter.

We have set out above a consent order made by both parties at the time directions were made. The parties agreed that the affidavits on record be considered. That takes care of the appellant's complaint that an affidavit in respect of chamber summons which was withdrawn was considered. At paragraph 8 of that affidavit, the respondent stated:-

“8. That it was our understanding that I would pursue the said suit and on successful conclusion the said land would be owned jointly.”

At paragraph 11, the respondent further stated:-

“11. That despite several requests for the defendant to transfer the land to me and or have the same registered jointly he has refused to do so.”

These two assertions by the respondent clearly demonstrate that the respondent was all along during his stay on the land, aware that half of that land rightly belonged to the appellant and he was thus aware that he was in possession of that half courtesy of his brother, the appellant. Our view is further buttressed by respondent's evidence in court. He said:-

“My mother wanted the land to be owned by us jointly.”

We think it was with that in mind that when one of the appellant's sons went to the land in 1999, the respondent could not stop him from building a house on the land. He allowed him to do so and the appellant's son together with the sons of their sister continued to live on the land. We hold that the respondent was in adverse possession of only half of the suit land. He was not in law in adverse possession of the other half of the land which he knew was for the appellant as per the wishes of their mother and that is why the appellant's son and sister's son occupied it. In short although the entire piece of land was registered in the appellant's name it was with the full knowledge that he held half of the land for himself and the other half for the respondent. Likewise the respondent occupied the land with the full knowledge that his entitlement was only in respect of half of the land. We attach no importance to the complaint that the learned Judge referred to the appellant as consummate liar as the evidence on record speaks for itself.

The above being our view of the matter, we allow the appeal partly and order that the land in dispute KIAMBAA/RUAKA/T67 be partitioned into two equal parts and one part be registered in the appellant's name while the other part be registered in the respondent's name. The respondent shall take the part where his house is currently standing (namely, as at the date of this judgment). To that extent, the appeal succeeds, and the judgment of the superior court is varied accordingly. The appellant to have half the costs of the appeal and of the superior court. Orders accordingly.

Dated and delivered at Nairobi this 11th day of December, 2009.

S.E.O. BOSIRE
.....
JUDGE OF APPEAL

P. N. WAKI
.....
JUDGE OF APPEAL

J. W. ONYANGO OTIENO
.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR